743

FILED
FEB 12 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-5618

IN THE

Supreme Court of the United States

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

LEE T. LAWLESS
FEDERAL PUBLIC DEFENDER
MICHAEL DWYER*
ASSISTANT PUBLIC DEFENDER
DAVID HEMINGWAY
RESEARCH & WRITING ATTORNEY
FEDERAL PUBLIC DEFENDER OFFICE
1010 MARKET STREET - SUITE 200
ST. LOUIS, MISSOURI 63101
(314) 241-1255

Counsel for Petitioner

* Counsel of Record

February 12, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. THIS COURT HAS ALREADY EXCISED THE EXTRAORDINARY CIRCUMSTANCES REQUIREMENT AS INCONSISTENT WITH A CONSTITUTIONAL ADVISORY GUIDELINES SYSTEM	2
II. REQUIRING "EXTRAORDINARY JUSTIFICATIONS" FOR SENTENCES "SIGNIFICANTLY" OUTSIDE THE GUIDELINE RANGE VIOLATES THE SIXTH AMENDMENT	4
III. THE POSSIBILITY OF VARIANCE FROM THE GUIDELINE RANGE IN EXTRAORDINARY CIRCUMSTANCES DOES NOT AVOID THE SIXTH AMENDMENT VIOLATION	8
IV. DISCRETION TO VARY TO AN "INSUBSTANTIAL" DEGREE FROM THE GUIDELINE RANGE DOES NOT AVOID THE SIXTH AMENDMENT VIOLATION	10
V. REQUIRING SENTENCES TETHERED TO THE GUIDELINES PERPETUATES TRUE DISPARITY AND THWARTS THE DEVELOPMENT OF BETTER SENTENCING PRACTICES	12
VI. THE SENTENCE IMPOSED BY THE DISTRICT COURT WAS REASONABLE IN LIGHT OF SECTION 3553(A)'S PURPOSES AND FACTORS AND THE REASONS GIVEN	18
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

Apprendi v. New Jersey, 530 U.S. 466 (2000) 4, 12
Blakely v. Washington, 542 U.S. 296 (2004) 4, 7, 8, 10, 15
Cunningham v. California, 127 S. Ct. 856 (2007) 1, 4, 5, 7, 8
Harris v. United States, 536 U.S. 545 (2002) 6
Koon v. United States, 518 U.S. 81 (1996) 13, 19, 20
United States v. Blackford, 469 F.3d 1218 (8th Cir. 2006) 10
United States v. Booker, 543 U.S. 220 (2005) ..... *passim*
United States v. Claiborne, 439 F.3d 479 (8th Cir. 2006) 9
United States v. Duhon, 440 F.3d 711 (5th Cir. 2006) 10
United States v. Ennis, 2006 WL 3831216 (D. Mass., Dec. 22, 2006) 13
United States v. Gall, 446 F.3d 884 (8th Cir. 2006) 6
United States v. Grier, No. 05-1698, 2007 WL 315102 (3d Cir. Feb. 5, 2007) 12
United States v. Hampton, 441 F.3d 284 (4th Cir. 2006) 10
United States v. Johnson, 445 F.3d 339 (4th Cir. 2006) 9
United States v. Jones, 460 F.3d 191 (2d Cir. 2006) 4
United States v. Kendall, 446 F.3d 782 (8th Cir. 2006) 8
United States v. McMannus, 436 F.3d 871 (8th Cir. 2006) 8
United States v. Medearis, 451 F.3d 918 (8th Cir. 2006) 9
United States v. Ortega-Estrada, 2006 WL 3491779 (10th Cir. 2002) 10

TABLE OF AUTHORITIES - continued

Page

United States v. Pho, 433 F.3d 53 (1st Cir. 2006) 10
United States v. Portillo, 458 F.3d 828 (8th Cir. 2006) 7
United States v. Repking, 467 F.3d 1091 (7th Cir. 2006) 10, 11
United States v. Thorpe, 447 F.3d 565 (8th Cir. 2006) 7
United States v. Valtierra-Rojas, 468 F.3d 1235 (10th Cir. 2006) 9, 11
United States v. Zapete-Garcia, 447 F.3d 57 (1st Cir. 2006) 8
Williams v. United States, 503 U.S. 193 (1992) ... 2, 3

CONSTITUTIONAL PROVISIONS

Sixth Amendment ..... *passim*

STATUTES

18 U.S.C. § 924(c)(1)(A) (2006 ed.) 6, 11
18 U.S.C. § 3553(a) (2004 ed.) ..... *passim*
18 U.S.C. § 3553(b)(1) (2004 ed.) 3, 9
18 U.S.C. § 3742(e)(3) (2004 ed.) 1, 2, 3
18 U.S.C. § 3742(f)(2) (1992 ed.) 3, 4
18 U.S.C. § 3742(f)(2) (2004 ed.) 3
28 U.S.C. § 991(b) (2004 ed.) 13

GUIDELINES

USSG §2K2.4 6
USSG §2D1.1(c)(14) 16

OTHER AUTHORITIES

124 Cong. Rec. 209 (1978) (unprinted amendment No. 1100 adopted Jan. 23, 1978) ... 9

TABLE OF AUTHORITIES - continued

Page

American Bar Association Justice Kennedy Commission, Reports with Recommendations (Aug. 9, 2004) 17

Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After* United States v. Booker (August 2006), *available at* http://www.fd.org/pdf_lib/Evans Struggle.pdf..... 15

Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315 (2005) 15

Frank O. Bowman, III, *The Year of Jubilee . . . Or Maybe Not*, 43 Hous. L. Rev. 279 (2006) 15

Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent R. 180, 1999 WL 730985 (Jan./Feb. 1999) 17

Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (1988) . 17

Constitution Project, Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* (June 7, 2005) 17

Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. J. 1681 (1992) 15

M.K.B. Darmer, *The Federal Sentencing Guidelines After* Blakely *and* Booker: *The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C.L. Rev. 533 (2005) 15

Paul J. Hofer, *Immediate and Long-Term Effects of* United States v. Booker, 38 Ariz. St. L.J. 425 (2006) 10

TABLE OF AUTHORITIES - continued

Page

Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19 (2003) ... 12

Kim S. Hunt & Michel Connelly, *Advisory Guidelines in the Post*-Blakely *Era*, 17 Fed. Sent. R. 233, 2005 WL 2922198 (April 2005) . 17

Linda Drazga Maxfield, *U.S. Sentencing Commission, Final Report: Survey of Article III Judges on the Federal Sentencing Guidelines* (Mar. 2003) 13, 14

Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 Fed. Sent. Rep. 260, 2002 WL 31304861 (Mar./Apr. 2002) 14

Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. Rev. 649 (2003) 15

Frank J. Remington, *The Federal Sentencing Guidelines As A Criminal Code: Why the Model Penal Code Approach is Preferable*, 7 Fed. Sent. R. 116, 1994 WL 780781 (Nov./Dec. 1994) 19

Stephen R. Sady, *Guidelines Appeals: The Presumption of Reasonableness and Reasonable Doubt*, 18 Fed. Sent. R.. 170 (2006) 12

Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts 41* (1998) 9

TABLE OF AUTHORITIES - continued

Page

U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (February 4, 1994) 16

U.S. Sentencing Commission, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005). 16

U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (2004) 12, 14, 15, 16, 17

U.S. Sentencing Commission, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing* (March 2006)..... 14, 16

U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004).. 16

U.S. Sentencing Commission, *Recidivism and the First Offender* (May 2004) 16

U.S. Sentencing Commission, *Report to Congress – Cocaine and Federal Sentencing Policy* (May 2002) 16

U.S. Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* (October 2003) 14

U.S. Sentencing Commission, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* (1998) 14

S. Rep. No. 98-225, 98th Cong., 1st Sess. 13

REPLY BRIEF

The government's attempt to advance the rule that a sentence constituting a substantial variance from the Guidelines must be justified by extraordinary circumstances is unavailing. This rule is inconsistent with *United States v. Booker,* 543 U.S. 220 (2005).

First, in excising the PROTECT Act version of § 3742(e), this Court rejected an appellate review standard that tied the degree of variance to the guideline range as incompatible with a constitutional advisory guideline system.

Second, the rule the government advances violates the bright-line rule, recently reaffirmed in *Cunningham v. California,* 127 S. Ct. 856 (2007), that any fact that increases the penalty for a crime beyond the statutory maximum provided by law must be submitted to a jury. The government's rule requires extraordinary circumstances for sentences that are not within or nearly within the guideline range. This "extraordinary circumstances rule" necessarily demands judicial factfinding, first to compute the guideline range, which, in virtually every case, mandates a sentence greater than that based solely on the facts established by a jury verdict or the defendant's admissions and second, to establish circumstances sufficiently extraordinary to permit a variance from the guideline range. Thus, the government's proposed rule is indistinguishable, for Sixth Amendment purposes, from the mandatory Guidelines that *Booker* held unconstitutional.

Third, the government's contention that uniformity requires appellate focus on the Guidelines rather than § 3553(a) ignores both Congressional intent and the disparities the Guidelines create.

Finally, based on the extraordinary circumstances rule, the government urges deference only to the guideline range, dismissing as "common" the circumstances of the offense and

the characteristics of the offender upon which the district court relied in determining that a 15-month sentence was sufficient but not greater than necessary to satisfy § 3553(a)'s purposes. The district court imposed a "reasonable" sentence.

I. THIS COURT HAS ALREADY EXCISED THE EXTRAORDINARY CIRCUMSTANCES REQUIREMENT AS INCONSISTENT WITH A CONSTITUTIONAL ADVISORY GUIDELINES SYSTEM.

The government notes that the pre-*Booker* standard of review was designed to "reinforce" the Guidelines, Resp. Br. 17, and argues for a post-*Booker* standard of review that will continue to "reinforce" the Guidelines. Resp. Br. 19. Indeed, it argues for a standard of review–requiring that the justification for a non-guideline sentence be more extraordinary the further the sentence varies from the guideline range–that would reinstate two of the changes wrought by the PROTECT Act in 2003 that made the guidelines even more mandatory than they had been: those requiring the courts of appeals to determine whether a sentence outside the guideline range "is not justified by the facts of the case" and whether "the sentence departs to an unreasonable degree from the applicable guidelines range." 18 U.S.C. § 3742(e)(3)(B)(iii), (C) (2004 ed.). This Court excised the PROTECT Act standard of review as inconsistent with a constitutional guideline system, and replaced it with a standard of review based on the pre-2003 text. *Booker*, 543 U.S. at 260-63.

The government, however, misleadingly argues: (1) that under the pre-2003 standard a sentence was "reasonable" if the reasons were "sufficient to justify the magnitude of the departure," citing *Williams v. United States*, 503 U.S. 193, 204 (1992), (2) that this Court adopted the pre-2003 standard in *Booker*, citing 543 U.S. at 261, and (3) that, therefore, "[p]roportionality review using the Guidelines as a

benchmark" is consistent with *Booker*. Resp. Br. 27-28. This erroneous argument misreads both *Williams* and *Booker*.

In *Williams*, 503 U.S. at 203-04, this Court interpreted § 3742(f)(2), which provided for remand of a sentence outside the guideline range if it was "unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable" and was "too high" or "too low." 18 U.S.C. § 3742(f)(2) (1992 ed.). Then as now, the plain language of § 3742(f) did *not* tie the permissible magnitude of departure to the applicable guideline range. The provision that *Booker* excised *did* tie the permissible degree of departure to the guideline range. *Compare* § 3742(e)(3) (2002 ed.) *with* § 3742(e)(3) (2004 ed.) (as amended by the PROTECT Act, requiring review of whether "the sentence departs to an unreasonable degree from the applicable guidelines range"). And that is precisely why it was excised. *Booker*, 543 U.S. at 260 (PROTECT Act version of § 3742(e) "contains critical cross-references to the (now-excised) Section 3553(b)(1) and consequently must be severed and excised for similar reasons."). The Court in *Booker* adopted the pre-2003 text of § 3742(e), which "told appellate courts to determine whether the sentence 'is unreasonable' with regard to Section 3553(a). Section 3553(a) remains in effect and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts . . . in determining whether a sentence is reasonable." *Id.* It was unnecessary to excise § 3742(f) because its literal terms refer to neither § 3553(b) nor the guideline range as a measure of what is an "unreasonable degree," "too high," or "too low." *See* § 3742(f)(2) (2004 ed.). Indeed, the Court's only reference to § 3742(f) was to say that "some provisions will apply differently from the way Congress had originally expected" because "that mandatory system is no longer an open choice." 543 U.S. at 263.

In short, *Booker* has already made clear that the benchmark for unreasonableness is the totality of § 3553(a)'s purposes and factors, not the single factor of the guideline range. The

only court of appeals to reach the question has held that whether a sentence is "too high" or "too low" under § 3742(f)(2) is measured against the "benchmark" of "the range of reasonableness" in light of § 3553(a). *United States v. Jones*, 460 F.3d 191, 197 n.2 (2d Cir. 2006). This is the only interpretation consistent with the Sixth Amendment.

II. REQUIRING "EXTRAORDINARY JUSTIFICATIONS" FOR SENTENCES "SIGNIFICANTLY" OUTSIDE THE GUIDELINE RANGE VIOLATES THE SIXTH AMENDMENT.

This Court recently reaffirmed the "bright-line" rule that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Cunningham v. California*, 127 S. Ct. 856, 868 (2007) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). For purposes of the Sixth Amendment principle, the "statutory maximum" to which the rule refers "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303 (2004). The Court applied this rule to the Federal Sentencing Guidelines in *Booker*, holding that because the Guidelines required the judge to impose a sentence that was not authorized by the facts found by the jury, imposition of the Guidelines sentence violated the Sixth Amendment. *See Booker*, 543 U.S. at 235. The remedy for this violation was to render the Guidelines "'[m]erely advisory provisions,' recommending but not requiring 'the selection of particular sentences in response to differing sets of facts[.]'" *Cunningham*, 127 S. Ct. at 870.

Under an advisory guideline system, one capable of preserving the right to a jury trial, judicial factfinding does not make the difference between permissible and impermissible sentences. *See id.* The government, however, asserts that there is no Sixth Amendment impediment to the legal requirement that the facts and circumstances of a case be

more extraordinary the further a sentence varies above or below the guideline range because, it claims, under advisory Guidelines the judge has the authority, based on the jury findings alone, to impose a sentence up to "the statutory maximum provided by the United States Code." Resp. Br. 41-42.

To state the government's position is to identify its fatal weakness. The assertion that judges remain free, based on the jury verdict alone, to reach the United States Code maximum irreconcilably conflicts with the proposed requirement that significant variation from the guideline range be supported by proof of extraordinary circumstances. Quite simply, the government's argument would read the Constitutional majority opinion in *Booker* and its Sixth Amendment antecedents out of existence. *See Cunningham*, 127 S. Ct. at 870 n.15.

The maximum sentence supportable by a jury verdict or guilty plea would seldom, if ever, approach the statutory maximum provided by the United States Code. The circumstances of respondent Fanfan's conviction (in the companion case to *Booker*) illustrate this point. 543 U.S. at 228. The findings by the jury convicting Fanfan only supported a guideline range of 63-to-78 months. *Id.* Application of the Guidelines, however, required judicial factfinding leading to a higher range of 188-to-235 months and, therefore, would have violated the Sixth Amendment. *Id.*

The rule the government advances not only authorizes, but compels the same result. This rule would require the district court to presume the 188-to-235 month range reasonable and sentence within that range absent extraordinary circumstances. The government limits "extraordinary circumstances" to factors that "substantially distinguish [the defendant] from the hundreds of other defendants who share the same general characteristic." Resp. Br. 43. Applying that definition in Claiborne's case, the government dismisses drug

quantity as an ordinary, "common feature" of drug cases failing to support even a 22-month variation. Resp. Br. 42-43. The jury finding that Fanfan's conspiracy involved at least 500 grams of cocaine would seem at least as common to the hundreds of defendants whose juries found their conspiracies to involve at least 500 grams. The extraordinary justification rule, however, would *compel* Fanfan's judge to sentence him at or near the 188-to-235 month range based on facts found by a judge under the preponderance standard. In fact, Fanfan's judge would be barred from sentencing him at the range supported by the jury findings alone unless he could find additional, mitigating facts–facts extraordinary enough to justify a variance almost ten years below the range.

Another example illustrates the Sixth Amendment defect in the government's rule. Under 18 U.S.C. § 924(c)(1)(A)(iii), which prohibits using or carrying a firearm during and in relation to certain offenses, the statute and the applicable guideline require a five-year sentence. 18 U.S.C. § 924(c)(1)(A)(i); USSG §2K2.4(b). If the judge makes the additional finding that the firearm was discharged, the penalty under both the statute and the Guidelines is ten years, doubling the sentence authorized by the jury verdict alone. *See Harris v. United States,* 536 U.S. 545, 556 (2002) (discharge finding is for the judge to make); USSG §2K2.4(b). The ten-year sentence is not authorized, under the extraordinary circumstances rule, unless the *judge* finds that the firearm was discharged (or finds some other aggravating fact that establishes an extraordinary circumstance). Yet if the judge makes the discharge finding, the government's extraordinary circumstances rule requires the judge to impose a sentence twice that authorized by the jury's findings.

The record of reversals of downward variances, *see* FPCD Br. 21-22 & App. A9-10; NYCDL Br. 4-9 & App.2a-4a, shows that the facts needed to enable a judge to impose the sentence supported by jury findings alone will rarely, if ever, exist. *See, e.g., United States v. Gall*, 446 F.3d 884 (8th Cir.

2006) (three years probation unreasonable variance from 30-month guideline minimum despite defendant's withdrawal from conspiracy, exemplary post offense conduct, completion of college, and successful employment); *United States v. Portillo*, 458 F.3d 828, 829-30 (8th Cir. 2006)(reversing downward variance to sentence corresponding with jury verdict, which district court based on the purposes of sentencing and its determination that uncorroborated informant testimony attributing more drugs to the defendant was dubious, because "district court cannot consider credibility as part of its § 3553(a) analysis"); *United States v. Thorpe*, 447 F.3d 565, 567-68 (8th Cir. 2006) (court erred in varying to sentence corresponding with jury verdict based on its discomfort with severity of drug penalties and how little government must prove).

Reasonableness review under *Booker* cannot–as the government would have it–"render academic the entire first part of *Booker* itself." *Cunningham*, 127 S. Ct. at 870 n. 15. "Reasonableness . . . is not . . . the touchstone of Sixth Amendment analysis. The reasonableness requirement *Booker* anticipated for the federal system operates *within* the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints." *Id.* at 870. "When a judge inflicts punishment that the jury verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . . and the judge exceeds his proper authority." *Blakely v. Washington*, 542 U.S. at 303. The extraordinary circumstances requirement compels the application of sentencing ranges enhanced by facts found by judges beyond the jury's verdict in all but the most exceptional cases. This type of appellate review would deprive judges of the freedom to impose a sentence anywhere within the United States Code range based on the verdict or guilty plea alone just as the unconstitutional "mandatory guidelines" system did before *Booker*.

III. THE POSSIBILITY OF VARIANCE FROM THE GUIDELINE RANGE IN EXTRAORDINARY CIRCUMSTANCES DOES NOT AVOID THE SIXTH AMENDMENT VIOLATION.

The government claims that judges have broader discretion to go outside the guideline range because variances under advisory Guidelines are not encumbered by the limits the Guidelines place on departures. Resp. Br. 38-39. Even if true, under the government's version of advisory Guidelines, this distinction is unavailing. In *Blakely*, the state argued a jury verdict enabled a judge to impose the higher range of sentence because the statutory enumeration of grounds for imposing a higher sentence was not exclusive. 542 U.S. at 305. The Court rejected this distinction. "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact . . . one of several specified facts . . . or any aggravating fact" the jury's verdict alone did not authorize the court to use the higher range. *Id.* *See also* *Cunningham*, 127 S. Ct. at 865.

Furthermore, the government's claim rests on the false premise that its version of the advisory Guidelines system gives judges meaningfully greater discretion than they had under the mandatory system. The government's view of an "extraordinary justification" requires factors that "substantially distinguish the defendant from the hundreds of other defendants who share the same general characteristic." Resp. Br. 38., 43 & n. 13. It would prohibit or restrict reliance on facts allegedly used to set the guideline range. *See* Resp. Br. 43 & n. 12, 47; *see also, e.g., United States v. Zapete-Garcia*, 447 F.3d 57 (1st Cir. 2006); *United States v. Kendall*, 446 F.3d 782 (8th Cir. 2006); *United States v. McMannus*, 436 F.3d 871, 875 (8th Cir. 2006). And it would exclude non-case-specific grounds, Resp. Br. 49-50, such as a policy disagreement with the Commission. *But see* *Cunningham*, 127 S. Ct. at 862-63; *id.* at 877-78, 879 (Alito, J., dissenting); Senators Br. 29. This is nothing more than the

pre-*Booker* requirement for departures under (the now excised) § 3553(b), which required proof of circumstances "of a kind or to a degree" not adequately taken into consideration by the Commission in formulating the Guidelines.

Indeed, the system advocated by the government appears to be even more restrictive of discretion than the pre-*Booker* system. As the government is at great pains to establish, the extraordinary circumstances requirement is warranted on the theory that the Guidelines incorporate all of the purposes and factors listed in § 3553(a) and promote "uniformity,"[1] defined by the government as adherence to the Guidelines. Resp. Br. 13-16, 19-24, 26, 31. The presumptive guideline system in place before *Booker*[2] at least allowed for the possibility that there might be circumstances of a kind or to a degree not taken into account by the Commission in formulating the Guidelines. The incorporation theory, upon which the system advocated by the government depends, provides "no rationale for ever deviating from the guideline range," and thus

---

1. The incorporation theory (originated and adopted absent factual support, *see* FPCD Br. 5-7), has appeared as the sole rationale for the presumption of reasonableness and its companion sliding scale test. *See e.g., United States v. Valtierra-Rojas*, 468 F.3d 1235, 1239 (10th Cir. 2006); *United States v. Johnson*, 445 F.3d 339 (4th Cir. 2006); *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006) The "logic" proceeds as follows: (1) the Guidelines incorporate all § 3553(a) purposes and factors; (2) therefore, a within-guideline sentence is presumptively reasonable; and (3) therefore, a justification for a non-guideline sentence must be more extraordinary the further the sentence varies from the guideline range. This has become ritual incantation in cases involving a non-guideline sentence. *See, e.g., United States v. Medearis*, 451 F.3d 918, 920 (8th Cir. 2006).

2. Section 3553(b) was added to the Sentencing Reform Act for the purpose of making the Guidelines "presumptive." *See* 124 Cong. Rec. 209 (1978) (unprinted amendment No. 1100 adopted Jan. 23, 1978); Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 41 (1998).

"treat[s] the guidelines as more mandatory than before *Booker*." Paul J. Hofer, *Immediate and Long-Term Effects of United States v. Booker*, 38 Ariz. St. L.J. 425, 453-54 (2006).

Not surprisingly, then, appellate courts applying the government's version of reasonableness review frequently reject downward variances on the basis that the grounds relied on are discouraged by, not permitted by, or contrary to a choice by the Commission. *See, e.g., United States v. Ortega-Estrada*, 2006 WL 3491779 *3 (10th Cir. 2006)(disagreement with Commission policy decision to triple count prior assault conviction and to assign it the same number of points as murder was an invalid basis for variance); *United States v. Blackford*, 469 F.3d 1218, 1220 (8th Cir. 2006) (same as to policy decision to preserve prosecutor's discretion despite disparity it caused); *United States v. Pho*, 433 F.3d 53, 65 (1st Cir. 2006) (same as to policies regarding crack-powder disparity).[3] Even if the government's test allows for significant variances in *some* cases, as noted in *Booker*, "[t]he availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself." 543 U.S. at 234 (noting that in "most cases" sentences outside the guideline range will be unavailable).

IV. DISCRETION TO VARY TO AN "INSUBSTANTIAL" DEGREE FROM THE GUIDELINE RANGE DOES NOT AVOID THE SIXTH AMENDMENT VIOLATION.

The government also alleges that the extraordinary circumstances rule does not require Guidelines sentences in most cases, "or even in the vast majority of cases," because it

---

3. Variances based on offender characteristics also are frequently rejected as inconsistent with Guideline policy statements deeming such factors never or not ordinarily relevant. *See, e.g., United States v. Repking*, 467 F.3d 1091, 1095-96 (7th Cir. 2006); *United States v. Hampton*, 441 F.3d 284 (4th Cir. 2006); *United States v. Duhon*, 440 F.3d 711,716-17 & n.4 (5th Cir. 2006).

permits insignificant, or insubstantial variances from the guideline range on something less than extraordinary justifications.[4] Resp. Br. 38. This attempted distinction also does not avoid the Sixth Amendment problem. Whatever small variance would be permitted upon lesser justifications, the sentence resulting from this new and unspecified amount of "wiggle room" is still joined at the hip to the elevated guideline ranges that result from judicial factfinding. To again use the Fanfan example, an insignificant variance from the guideline range derived only from the facts of his conviction alone (perhaps a variance of 10 months at either end of the range of 63-to-78 months) produces a substantially shorter sentence than an insignificant variance from the Guidelines calculation based on judicial factfinding (188-to-235 months). *See Booker*, 543 U.S. at 228-29.

By statute, the top of a guideline range can be no more than 25 percent higher than the bottom of the range. 28 U.S.C. § 994(b)(2). The holding in *Booker* did not turn on Congress's choice of 25 percent instead of some higher number (say 40 percent), and there is no constitutional difference between the two. Yet the government's "extraordinary circumstances" requirement for a "substantial" variance does nothing more than create a *de facto* range of greater than 25 percent (although it studiously avoids identifying the line between substantial and insubstantial variances). Under the government's approach it is still the case that judicial

---

4. The government's claim that its sliding scale approach has its "primary force" only when a sentence is "significantly outside the range", Resp. Br. 38, is both beside the point and incorrect. In the very case it cites for this proposition, the Tenth Circuit made clear that it always looks to the "discrepancy" between the sentence imposed and the guideline range to determine whether the sentence was reasonable. *United States v. Valtierra-Rojas*, 468 F.3d 1235, 1239 (10th Cir. 2006). *See also United States v. Repking*, 467 F.3d 1091, 1095 (7th Cir. 2006) (rejecting argument that test applies based on percentages, explaining that the test is whether the "explanation is sufficiently proportional to the extent of the variance").

factfinding will authorize the imposition of sentences that would be unauthorized without additional factfinding, a result that violates *Apprendi*'s bright-line rule.[5]

V. REQUIRING SENTENCES TETHERED TO THE GUIDELINES PERPETUATES TRUE DISPARITY AND THWARTS THE DEVELOPMENT OF BETTER SENTENCING PRACTICES.

The government's position not only directly conflicts with both majority opinions in *Booker,* but its underlying policy rationale rests entirely on the demonstrably inaccurate premise that the Guidelines incorporate all of the § 3553(a) purposes and factors and promote the "uniformity" Congress had in mind. Resp. Br. 13-16, 19-24, 26, 31. Unprincipled uniformity, which the government advocates, elevates rules above reason by requiring offenders to be treated alike because the Guidelines say so, even when they differ in their culpability, the harm caused by their crime, or in their risk of recidivism. Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 83-84 (2003). True disparity, however, "gets its content from the purposes of sentencing. Unwarranted disparity is different treatment that is unrelated to our legitimate sentencing goals, or uniform treatment that fails to take into account differences among offenders that are relevant to our purposes and priorities." Hofer, *Immediate Effects*, 38 Ariz. St. L. J. at 442; U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of

---

5. A presumption that the Guidelines are reasonable also creates a "significant danger" of recreating a sentencing scheme that is unconstitutional under the Fifth Amendment. *United States v. Grier*, No. 05-1698, 2007 WL 315102, *23 n.37 (3d Cir. Feb. 5, 2007) (en banc) (Ambro, J., concurring) (citing Stephen R. Sady, *Guidelines Appeals: The Presumption of Reasonableness and Reasonable Doubt*, 18 Fed. Sent. R.. 170 (2006)).

Sentencing Reform 80, 113 (2004) (Fifteen Year Report). *See, e.g., United States v. Ennis*, 2006 WL 3831216 (D. Mass., Dec. 22, 2006) (purpose of career offender guideline would be negated if used to give low-level drug conspirator sentence twice as long as that received by drug suppliers).

Judicial discretion is essential to avoiding true disparity, first, to take account of factors bearing on sentencing purposes that the Guidelines do not, and second, to provide feedback through which the Guidelines might be improved. Understanding this necessity, Congress did not expect that the Guidelines would be developed, applied, or enforced in a mechanistic fashion. *See* S. Rep. No. 98-225, 98th Cong., 1st Sess. 52-54; Senators Br. 10-11, 14, 29; *Koon v. United States*, 518 U.S. 81, 92, 97 (1996). Instead, it directed the Commission to assure that the Guidelines met the purposes of sentencing set forth in § 3553(a)(2), to measure whether they were being met, *see* 28 U.S.C. §§ 991(b)(1)(A), (b)(2), and to see that they achieved the linked goals of avoiding unwarranted disparity and maintaining sufficient flexibility to permit individualized sentences when warranted. *See* 28 U.S.C. § 991(b)(1)(B).

The government makes the bald assertion that the Guidelines are the "appropriate benchmark" because they provide a "generally accurate" application of the § 3553(a) purposes and factors for "various categories of offenses and offenders." Resp. Br. 21-22. This assertion is plainly wrong. *See* NACDL Br. 12-25; Miller et al. Br. 11-23; WLF Br. 10-25; Lee Br. 10-14; NYCDL Br. 9-11; Sentencing Project Br. 7-17. As has been well documented, "the ideal model of policy development envisioned in the [Sentence Reform Act] was never fully implemented." Hofer, *Immediate Effects*, 38 Ariz. L. J. at 450; *see also, e.g.*, Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315 (2005); Linda Drazga Maxfield, *U.S. Sentencing Commission, Final Report: Survey*

of Article III Judges on the Federal Sentencing Guidelines ES2-7 (Mar. 2003).

The government dismisses as mere imperfection, Resp. Br. 24 & n. 4, the effect of the Guidelines in promoting disparities Congress sought to avoid. Sentences under the mandatory Guideline system were far more highly correlated with race than before the Sentence Reform Act, *see* Fifteen Year Report at 115, 122, as the result of rules (like the crack guideline) that do not achieve sentencing purposes, *id.* at 47-55, 76, 113-14, 117, 131-35, 141, and the government's practices and policies.[6] Regional disparity persisted and even increased in drug cases, again largely due to the government's actions. *Id.* at 94, 102, 103, 106, 111-12, 140-42. Indeed, it is the government, not judges, that has created the widest variation among districts and among circuits after *Booker*,[7] but unlike judicial decisions, prosecutors' decisions are hidden from view and unreviewable.[8] The government prefers curtailment of judicial discretion because it allows prosecutors more power to dictate sentencing outcomes–through its charging decisions, control over relevant conduct "facts" that are "proved" without reliable procedural safeguards, substantial assistance departures, "fast track" departures, and the third acceptance of responsibility point,

---

6. Fifteen Year Report at 91, 102-05, 141; U.S. Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (October 2003); Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 Fed. Sent. Rep. 260, 2002 WL 31304861 (Mar./Apr. 2002); U.S. Sentencing Commission, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* 20-21 (1998).

7. U.S. Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 88-92 (March 2006) (Booker Report).

8. Fifteen Year Report at 82.

among other tools.[9] *See* Hofer, *Immediate Effects*, 38 Ariz. L. J. at 447 ("disparity-talk" often used "as a cover to further restrict judicial discretion, empower prosecutors, and pursue harsher sentences divorced from any comprehensive philosophy of punishment.").

Contrary to the government's arguments, the Guidelines "permit typical offenders to receive sentences equal to those received by the most aggravated and dangerous offenders or the least culpable and threatening ones," Resp. Br. 21, according to the Department of Justice and the Commission.[10] *See* U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (February 4, 1994)[11]; U.S. Sentencing Commission, *Report to Congress – Cocaine and Federal Sentencing Policy* (May 2002). The Guidelines also create vastly disparate sentences for comparable offenses and offenders. For example, the guideline sentence for the same amount of powder cocaine in

---

9. *See, e.g.*, Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines*, 105 Colum. L. Rev. 1315, 1336-40 (2005); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. J. 1681, 1714 (1992); Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. Rev. 649, 670 (2003); M.K.B. Darmer, *The Federal Sentencing Guidelines After Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C.L. Rev. 533, 569-71 (2005); Frank O. Bowman, III, *The Year of Jubilee . . . Or Maybe Not*, 43 Hous. L. Rev. 279, 321-23 (2006).

10. Contrary to the claims of the government and the Commission, *see* Resp. Br. 49-50 and USSC Br. 27-28, Congress did not mandate the disparity reflected in the drug or career offender guidelines; rather, this is the result of choices the Commission made. *See* Fifteen Year Report at 49; Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After United States v. Booker* 49-51 (August 2006), http://www.fd.org/pdf_lib/EvansStruggle.pdf.

11. The Justice Department's report may be accessed at http://www.fd.org/pdf_lib/1994%20DoJ%20study%20part%201.pdf.

this case would have been 6-12 months. USSG §§2D1.1(c)(14), 3E1.1(a) (2003 ed.). The district courts have tried to remedy this disparity after *Booker*, *see* Booker Report at 128 (rate of below-guideline sentences in crack cases tripled), but restrictive post-*Booker* caselaw which the government promotes restricts judges "to focusing only on the record in a particular case," Resp. Br 21, 49-50, an approach with which the Senators specifically disagree. Senators Br. 23 n.5. It particularly blinks reality to claim that the Guidelines are the appropriate benchmark in this crack case. *See* Senators Br. 21 ("[T]he Commission's own statements on the fundamental unfairness of the 100:1 ratio in the weight of powder and cocaine–a ratio currently incorporated in the sentencing guidelines–demonstrate that the guidelines do not always reflect objective data or good policy."). The criminal history rules rest on *no* empirical evidence, and overstate the risk of recidivism (both by excluding factors that predict reduced recidivism and including factors with no predictive value) and create racial disparity without serving sentencing purposes.[12]

Judicial discretion is therefore necessary to achieve sentencing purposes and avoid what Congress meant by unwarranted disparity. Yet the government claims that the Guidelines are the only appropriate benchmark, Resp. Br. 25, and that sentences imposed outside the guideline range by judges create disparity. *Id.* at 25-26. In fact, the Commission "lack[s] good data on all legally relevant considerations that might help explain differences in sentences," a problem "especially severe regarding circumstances that might justify departure from the guidelines," because the Commission

---

12. U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004), *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005), *Recidivism and the First Offender* (May 2004); Fifteen Year Report at 133-34.

collects data on such circumstances only if a departure was granted, but not otherwise. Fifteen Year Report at 119. Thus, the Guidelines (by prohibiting and restricting departures) create a false benchmark for disparity and deprive the Commission of relevant information about considerations that would more effectively and efficiently satisfy the purposes of sentencing.

Booker provides a chance for the Commission to use feedback from judges to further "better sentencing practices" in response to the wealth of information that sentencing based on § 3553(a)'s purposes provides. In that way, unwarranted disparity might be avoided. *Booker*, 543 U.S. at 263.[13]

If district courts in all circuits were genuinely free to exercise their discretion to consider all relevant § 3553(a) purposes and factors, there may well be more non-guideline sentences in those circuits that currently restrict discretion, but less true disparity. *See* Hofer, *Immediate Effects*, 38 Ariz. St. L.J. at 456-57, 462. Indeed, evidence from the states shows that presumptive guidelines are no more successful in reducing disparity than advisory guidelines, and that advisory guidelines have several advantages, including (1) greater judicial discretion as a check on unwarranted uniformity and unwarranted disparity created by prosecutorial practices; (2) less resistance to change; and (3) greater transparency. *See* Kim S. Hunt & Michel Connelly, *Advisory Guidelines in the Post-Blakely Era*, 17 Fed. Sent. R. 233, 2005 WL 2922198 **6-12 (April, 2005).

---

13. *Compare* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 18-20, 23 (1988) *with* Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent R. 180, 1999 WL 730985 (Jan./Feb. 1999); American Bar Association Justice Kennedy Commission, *Reports with Recommendations* (Aug. 9, 2004); Constitution Project, Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems*, 32-34 (June 7, 2005).

Reasonableness review as *Booker* intended, focused on the district court's explanations in light of all relevant § 3553(a) purposes and factors, is not "abdication." *See* Resp. Br. 9, 30. An appellate court must review the record to confirm that the judge in fact considered § 3553(a)'s factors and sentencing purposes. *See* FAMM Br. 22-28. The review includes a substantive component when the record may reflect that a judgment, "although procedurally proper, is nonetheless arbitrary and capricious and manifestly irrational." FAMM Br. 27. Appellate courts do not abdicate their role by ensuring that sentences rest on reasoned judgment, rather than whim or blind adherence to the rules. Such review advances Congress's goals by ensuring federal sentences reflect § 3553(a)'s factors and purposes and improves the feedback mechanism from the courts to the Commission. *Booker*, 543 U.S. at 263. The government's version of review focused on the Guidelines accomplishes neither goal.

VI. THE SENTENCE IMPOSED BY THE DISTRICT COURT WAS REASONABLE IN LIGHT OF SECTION 3553(A)'S PURPOSES AND FACTORS AND THE REASONS GIVEN.

The government dismisses the judge's reliance on the circumstances of the case (the small drug quantity, the lack of violence or weapon) and Claiborne's characteristics (his lack of prior criminal history or imprisonment, devotion to his family, and rehabilitative progress) as merely "common features" of drug cases. Resp. Br. 42-43. Indeed, it is all too common that low-level drug offenders with little risk of recidivism receive sentences that are greater than necessary to satisfy legitimate sentencing purposes, as the Guidelines assign penalties based on drug quantity that overstate offense seriousness, reflect an assumption of violence when none occurred, and fail to take account of factors (like employment history and first offender status) that predict reduced recidivism. *See* pp.14-16, above; Senators Br. 21, 27-28, 29.

After *Booker*, § 3553(a) requires judges to address these features in all cases, and "[i]f something about the circumstances of a case makes the crime . . . less serious than other crimes receiving that offense level" -- such as that the quantity of drugs is neither an accurate measure of harm nor typical of a drug kingpin or manager--"those circumstances can justify an outside-range sentence." Hofer, *Immediate Effects*, 38 Ariz. St. L. J. at 454 n. 145, 461; *id.* at 445-46 & n. 103. A number of the district court's reasons consisted of "unique factors. . . 'little susceptible . . of useful generalization,'" evaluation of which Congress entrusted to district courts "better positioned" to evaluate them. *Koon*, 518 U.S. at 99. This is not lost on the Amici Senators who, well acquainted with the Act's evolution and familiar with the facts here, concurred that "the district court may indeed have been correct that a sentence of 15 months instead of 37 [to] 46 months was warranted in light of the specific facts of the offense and the defendant's background." Senators Br. 27, 29. Only the district judge (not the court of appeals or the Commission), has special competence to "weigh what can't be measured," such as remorse, resilience, and contrition. *See* Remington, Frank J., *The Federal Sentencing Guidelines As A Criminal Code: Why the Model Penal Code Approach is Preferable*, 7 Fed. Sent. R. 116, 1994 WL 780781 (Nov./Dec. 1994). The government's emphasis on Claiborne's volunteered admission that he tried to sell crack for two months leading up to his arrest does not render the judge's choice unreasonable. Resp. Br. 45, 49. The veteran district judge was undoubtedly aware that few small time crack sellers get arrested at their first sale, and that the candor of this unsolicited detail was a factor in mitigation. The government's claim that the judge did not rely on Claiborne's role in supporting his family fails in the face of the judge's many references to it as she imposed sentence. Resp. Br. 48; J.A. 70-71.

These factors must be considered under § 3553(a) and they compel substantial deference on appeal to provide district courts the flexibility necessary to do so. "So long as the overall sentence is 'sufficient, but not greater than necessary to comply' with the [statutory sentencing] goals, the statute is satisfied. Section 3553(a)." *Koon*, 518 U.S. at 108. The district court's sentence was certainly within the range of reasonableness.

CONCLUSION

The Eighth Circuit's decision should be reversed with instructions to affirm the district court.

Respectfully submitted,

LEE T. LAWLESS
FEDERAL PUBLIC DEFENDER
MICHAEL DWYER*
ASSISTANT PUBLIC DEFENDER
DAVID HEMINGWAY
RESEARCH & WRITING ATTORNEY
FEDERAL PUBLIC DEFENDER OFFICE
1010 MARKET STREET - SUITE 200
ST. LOUIS, MISSOURI 63101
(314) 241-1255

Counsel for Petitioner

February 12, 2007

* Counsel of Record

APPENDIX

STATUTORY ADDENDUM

STATUTES

18 U.S.C. §924 Penalties (2006 ed.)

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses, a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime–

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 3553(a) (2004 ed.). Imposition of a sentence

(A) Factors to be considered in imposing a sentence.– The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed–

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any

amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence

(1) In general.– Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court

shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

18 U.S.C. § 3742. Review of a Sentence (2002 ed.)

(e) Consideration.– Upon review of the record, the court of appeals shall determine whether the sentence–

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for–

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227, of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

18 U.S.C. 3742. Review of a Sentence. (2004 ed.)

(e) Consideration.– Upon review of the record, the court of appeals shall determine whether the sentence–

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall give

due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

18 U.S.C. § 3742. Review of a sentence (1992 ed.)

(f) Decision and disposition.– If the court of appeals determines that the sentence–

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and –

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

18 U.S.C. § 3742. Review of a sentence (2004 ed.)

(f) Decision and disposition.– If the court of appeals determines that–

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and –

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings which such instructions as the court considers appropriate, subject to subsection (g)

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

28 U.S.C. §991 (2004 ed.). United States Sentencing Commission; establishment and purposes

(b) The purposes of the United States Sentencing Commission are to–

(1) establish sentencing policies and practices for the Federal criminal justice system that–

(A) assure the meeting of the purposes of sentencing as set forth in Section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors, not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

GUIDELINE PROVISIONS

USSG §2K2.4 Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

(a) If the defendant, whether or not convicted of another crime, was convicted of violating section 944(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

(b) Except as provided in subsection (c), if the defendant, whether or not convicted of another crime, was convicted of violating section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute. Chapters Three and Four shall not apply to that count of conviction.

(c) If the defendant (1) was convicted of violating section 924(c) or section 929(a) of title 18, United States Code; and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). Except for §§3E1.1 (Acceptance of Responsibility), 4B1.1, and 4B1.2 (Definitions of Terms Used in Section 4B1.1), Chapters Three and Four shall not apply to that count of conviction.

(d) Special Instructions for Fines

(1)Where there is a federal conviction for the underlying offense, the fine guideline shall be the fine guideline that would have been applicable had there only been a conviction for the underlying offense. This guideline shall be used as a consolidated fine guideline for both the underlying offense and the conviction underlying this section.